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ABSTRACT

Recognizing that escalating concern about campus crime has focused attention nationwide on the Buckley Amendment (a federal privacy law designed to protect education records), this paper examines the legislative history and intent behind Congress's approval in 1974 of Buckley's Family Educational Rights and Privacy Act (FERPA). The paper first notes that this legislation opened school records to students and their parents but barred the release of records to anyone else without the permission of the student or the parents, and that this includes campus police records. The paper then looks at the question of access to information when state open records law and federal privacy rules appear to collide. The paper examines the legislative history and intent behind the FERPA Act. The paper also considers how the Department of Education (ED) has read FERPA and how judges have interpreted its intent in "Bauer v. Kincaid" and other recent cases. In an aftermath section, the paper examines the confusion at many universities after the "Bauer" case. Eighty-four footnotes are included. (NKA)

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THE BUCKLEY AMENDMENT

AND

CAMPUS POLICE REPORTS

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AEJMC Montreal Conference
Law Division
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Concerns about campus crime have focused attention nationwide on the Buckley Amendment, a federal privacy law designed to protect education records. Student journalists and parents' groups have charged some universities invoke the amendment to hide a growing crime problem on campus.[1] Only 10 percent or so of the nation's colleges and universities reported their crime statistics to the Federal Bureau of Investigation before a new federal law required those institutions to release their on-campus crime statistics beginning Sept. 1, 1991. At several universities, reports of campus rapes came out only when friends of the victims contacted the campus newspaper. Campus police logs never mentioned the incidents.[2]

A 1991 study of campus crime and drug/alcohol abuse by Towson State University in Maryland found that 37 percent of 10,000 randomly surveyed college student across the country had been victims of campus crime.[3] Journalists and parents' groups, such as Security on Campus, have continued to press universities to open police logs.

Some university officials and the U.S. Department of Education claim the Buckley Amendment demands confidentiality of names and other personal information on campus police reports. In 1991, however, student journalists won several court challenges for access to campus police records despite the Buckley Amendment. The amendment, named for its sponsor, former Sen. James L. Buckley, was approved by Congress in 1974 as the Family Educational Rights and

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[1] See E. Jerald Ogg, Student Records Privacy and Campus Crime Reporting: The Buckley Amendment after Bauer, COMMUNICATIONS AND THE LAW, September 1991, at 39, 40.

[2]Eleanor Randolph, "Students Say Colleges Use Law to Hide Bad News, Schools Say Funding Would be Lost if Privacy Guidelines Are Violated," WASH. POST, Nov. 30, 1989, §A at 22.

[3] "Schools Face the 3rd Degree on Crime, Dropout Rates," WASH. POST, Feb. 13, 1992, § J at 8.

Privacy Act (FERPA).[4] The legislation opened school records to students and their parents, but barred the release of education records to anyone else without the permission of the student or the parents.

Most states, however, have open records laws known as "sunshine laws" requiring public agencies to release records like police reports. Congress has considered amendments to clarify the right of access to campus police records, but no changes have become law. In the meantime several court cases have cleared the way for journalists to reach certain university records. Federal Judge Russell G. Clark decided in March 1991 that campus police records at Southwest Missouri State University are public records.[5] Clark held that withholding the crime reports is unconstitutional under the First Amendment and the equal protection guarantee of the Fifth Amendment of the Constitution.[6] In November 1991, a federal judge in Washington, D.C. ruled that the Department of Education may not threaten enforcement of the Buckley Amendment against schools that release campus law enforcement records.[7]

This paper will look at the question of access to information when state open records law and federal privacy rules appear to collide. How much access does the First Amendment guarantee in the face of a federal privacy law? What did Congress intend when it enacted FERPA and how has it been interpreted?

This paper will examine the legislative history and intent behind the act. It will consider how the Department of Education (DOE) has read FERPA and how judges have interpreted its

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[4] 20 U.S.C. § 1232g (1988).

[5] Bauer v. Kincaid, 759 F. Supp. 575, 595 (W.D.Mo. 1991).

[6] Id. at 594.

[7] Student Press Law Center v. Alexander, 778 F. Supp. 1227 (D.D.C. Nov. 21, 1991).

intent in Bauer v. Kincaid and other recent cases. In the aftermath section, the paper will examine the confusion at many universities after Bauer.

HISTORY AND INTENT OF FERPA

The Family Education Rights and Privacy Act was passed in 1974 to encourage schools to allow students and parents to see educational records and to limit the access of third parties.[8] Section (a)(1)(A) says

> *No [federal] funds shall be made available... to any educational agency or institution which has a policy of denying or which effectively prevents, the parents of students who are or have been in attendance at a school... the right to inspect and review the education records of their children.*

The limitations on access are covered in (b)(1):

> *No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records.. of students without the written consent of their parents to any individual, agency, organization....*

Before the act, most schools allowed school personnel, law enforcement agencies, welfare and health department workers and other government employees almost carte blanche access to school records, according to a report by the National Committee for Citizens in Education.(NCCE)[9] Yet only 12 states allowed parents any access to their children's files, the committee said. When mistakes or inaccurate information found its way into the records, that information could follow a child through school. Parents could not make changes without an opportunity to review school records or challenge them. The office of Sen. Buckley, a New York

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[8] 20 U.S.C. § 1232g (1988).

[9] National Committee for Citizens in Education, Children, Parents and School Records, cited in "Record Keeping in the Education Relationship," Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission, July 1977 at 412.

Conservative, became aware of the state of school records through a feature in Parade magazine.[10]

Buckley introduced Amendment No. 1289 for Protection of the Rights and Privacy of Parents and Students on May 9, 1975 on the Senate floor.[11] The amendment was one of dozens the Senate considered adding to the already voluminous Senate Bill 1539. The bill, intended to extend the Elementary and Secondary Education Act of 1965 for five years, also extended and amended "virtually every federal aid to education law on the books," according to Congressional Quarterly.[12]

Just five days later, on May 14, the Senate adopted Buckley's amendment after less than an hour of discussion.[13] Several senators, especially Ted Stevens of Alaska and Claiborne Pell, chairman of the education subcommittee, were concerned that no hearings were held. Few educators were aware of the bill.

The amendment, which came in the midst of the Watergate investigation, was perceived as a parental rights bill designed to halt government intrusion. Buckley reminded the Senate of the lessons learned from Watergate.[14] He noted that the Watergate revelations had emphasized the dangers of government data gathering and the abuse of personal files. "My amendment will help to provide parents with access to their children's school records, to prevent the abuse and

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[10] "How Secret School Records Can Hurt Your Child" Parade Magazine. (March 31, 1974) Printed in 120 CONG. REC. 13,953 (1974).

[11] 120 CONG. REC. 13,951 (1974)

[12] 13 CONGRESSIONAL QUARTERLY 1334 (1974)

[13] S. Res. 1289, 93rd Cong. 120 CONG. REC. 14,580 -14596. (1974)

[14] The Senate Judiciary Committee was investigating alleged political dirty tricks by Republicans including a break-in at Democratic headquarters at the Watergate building.

improper disclosure of such records and data, and to restore the rights of privacy to both students and their parents," Buckley said.[15]

After a brief discussion of the amendment, senators voted to delete one section that required parents' permission before their children took certain tests or participated in certain "experimental or attitude-affecting programs."[16] The rest of the amendment passed on a voice vote without a roll call. The Senate was preoccupied with other, seemingly more important concerns during May. Senators were hotly debating whether to limit busing students to achieve racial balance in the schools. At the same time, the House Judiciary Committee was considering impeaching President Nixon for his failure to cooperate with the Watergate investigation.[17]

After the House accepted a bill similar to the Buckley Amendment, a conference committee of Senate and House legislators adopted the Buckley Amendment and it was signed into law on Aug. 21, 1974.[18] Campus police reports were not mentioned in the original law. By early fall, education groups and officials learned of the new law and began calling Sen. Buckley's office to object to the new rules. After educational institutions and other interested parties launched a massive letter-writing campaign to members of Congress, the education subcommittees and the Department of Health, Education, and Welfare Legislative (HEW) Office worked out a compromise measure.[19] Pell, chairman of the education committee, and Buckley

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[15] 120 CONG. REC. 13,952 (1974)

[16] Id.

[17] "Watergate: A Renewed Climate of Confrontation," 12 CONGRESSIONAL QUARTERLY NATIONAL REPORT 1327. (May 25,1974)

[18] Elementary and Secondary Education Act, Public L. No. 380 (1974)

[19] Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission at 413. See also Carole Marie Mattessich, The Buckley Amendment: Opening School Files for Student and Parental Review, 24 CATH. U. L. Rev. 588, 596 (1975) for a discussion of the influence of interest groups on the legislative process.

sponsored the amendment. The revision, which became known as the Family Educational Rights and Privacy Act, was attached to a bill authorizing a library conference.[20]

Buckley and Pell issued a joint statement in December 1974 to explain their revision.[21] The changes nearly doubled the length of the law and covered items such as the rights of parents to challenge records, the rights of postsecondary students to access records and the confidentiality of recommendation letters. Perhaps most important, the revision defined education record generally and added a list of exceptions. The exceptions included teachers' and administrators' private notes, medical and psychiatric notes and school law enforcement records.[22]

Police records were covered in one of the most awkward and ambiguous paragraphs of the amended act. The revision said campus police records are not subject to FERPA

> "if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section [which allows access by certain third parties without prior parental or student consent], the records and documents of such law enforcement unit which (I) are kept apart from (education) records described in subparagraph (A), (II) are maintained solely for law enforcement purposes and (III) are not made available to persons other than law enforcement officials of the same jurisdiction."[23]

Buckley and Pell briefly referred to the changes in their joint statement. They explained that campus police records of a campus office would be excluded "if its personnel are not allowed access to a student's education records, and if its records on a student are used solely for law enforcement purposes and are only available to other law enforcement officials of the

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[20] 120 CONG. REC. 39,858 (1974) This resolution authorized the president to call a White House Conference on Library and Information Services in 1976.

[21] "Joint Statement in Explanation of Buckley/Pell Amendment," 120 CONG. REC. 39,862 (1974).

[22] Id.

[23] 20 U.S.C. § 1232g(B)

same jurisdiction."[24] No explanation was provided for "same jurisdiction." The Senate approved the amendment after a brief discussion and sent it to a conference of Senate and House members. With some minor changes, the revision was passed and signed into law on Dec. 31, 1974.[25]

INTERPRETATION OF FERPA

Many school administrators overreacted to the law when they realized that if they failed to comply, federal funding for their schools could be cut off. School officials took the wording of the new law to be all-encompassing and refused to release the names of cast members in a play, heights and weights of athletes and honor roll lists. School attorneys warned that the law prohibited the release of most student information without consent from students or parents.[26] Some of the law's ambiguities were cleared up in January 1975 when the HEW ruled that schools could release "directory information," such as a student's name, address, and telephone number.

Although Congress created the law in less than six months, it took HEW 18 months to issue rules for administration. One of the problems was that Congress did not authorize any money to implement the law.[27] Once the rules came out, HEW said it needed some time working with the law before it could make final changes.[28]

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[24] Joint Statement, supra, at 39,862.

[25] Public Law 93-568.

[26] Farmer, Gerri and Shipman, Marlin, "The Buckley Amendment: Some Uses and Effects in Six Southwestern States," Southwestern Mass Communication Journal, vol. 6, no. 2, 1990-91 at 43.

[27] Privacy study report, supra, at 416.

[28] "Final Rule on Education Record," Federal Register, June 17, 1976.

The way Congress hastily adopted FERPA - without hearings and with major changes one month after it became law - led to problems in interpretation and implementation. Education officials and other groups testified about these difficulties at a hearing in Washington, D.C. in August 1977.[29] Some of the most detailed recommendations came from the Privacy Protection Study Commission, which considered education records as part of its Congressionally-mandated study of the use of data banks and information systems in the public and private sectors.[30] David Linowes, chairman of the commission, told the committee in prepared remarks that educators were gradually getting used to the rules.[31] Because FERPA left each educational institution the responsibility for defining and enforcing its own rules for protection of records, different schools interpreted the act in different ways. While some officials perceived this ambiguity as a strength, leaving each institution some flexibility, it also led to confusion.[32]

One of the confusing areas was law enforcement records. The exemption for law enforcement records continued to be a problem area.[33] Congress attempted to balance competing interests by "keeping police out of school records and students out of investigative

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[29] Hearing on Education Act, H.R. 15, before the Subcommittee on Elementary, Secondary and Vocational Education of the Committee on Education and Labor, House of Representatives, 95th Cong., 1st Sess. (1977).

[30] Hearing on H.R. 15 at 26 (Statement of David F. Linowes, chairman of the Privacy Protection Study Commission) To evaluate the merits of FERPA as a privacy protection statute, the commission held four days of public hearings at which 56 witnesses testified in 1976. The witnesses represented parents, students, professional educators, administrators and government agencies. At that time, the final regulations had been in effect less than nine months.

[31] Id. at 28.

[32] Privacy study report, supra, at 416.

[33] Hearing at 23, (Statement of Thomas McFee, deputy assistant secretary for Management, HEW) at 23.

records," one official said.[34] However, old practices that allowed a freer exchange of information were slow to die, he said. And some media representatives argued the provision was a restriction on the First Amendment.

To qualify for the exclusion, police records had to be maintained separately from other education records and no exchange of information between those records and other education records was permitted. The privacy commission explained FERPA tried to build a wall between the records maintained by the police unit and those maintained by the rest of the educational institution.[35] If the educational institution and the police united shared any records, all the records of the police unit would become subject to FERPA's access provisions.

None of the recommendations suggested by the privacy commission or other speakers ever appeared in later amendments. At the hearing, speakers encouraged legislators to expand the privacy provisions of the act, to open files to college applicants and to allow a student or parent to bring a private suit against an educational institution and recover attorneys' fees. The only changes to the act since 1974 have been minor technical ones, perhaps because the law appeared to be working better than expected.

Legislators may have wanted to leave the act alone, rather than get entangled in controversial new amendments. The Buckley Amendment hearing was just one day of more than 57 days of hearings on H.R. 15, a house bill intended to extend federal education programs for another five years. Given the vast amount of material, it is not surprising the Buckley Amendment recommendations simply never made it to Congress. By July 1978, when Congress

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[34] Hearing at 19.

[35] Privacy study report, supra, at 421.

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debated the education bill, most school officials were accustomed to working with the requirements and there was little reason to tinker with the law.

THE BAUER CASE: STUDENT JOURNALIST TAKES ON THE UNIVERSITY

The legislative intent behind FERPA became an issue in 1990 in a suit filed by a college newspaper editor. When Southwest Missouri State University (SMSU) officials refused to let student journalists see a report of an alleged rape involving a varsity basketball player, Southwest Standard editor Traci Bauer took them to court and won. U.S. District Judge Russell G. Clark ruled in March 1991 that the university may not keep campus crime reports private.[36] University officials had argued crime reports were considered private education records under FERPA. Department of Education officials supported the university, claiming that federal funds could be withdrawn if university officials violated the federal privacy rules.

In Bauer v. Kincaid, Clark ruled that the university must release the incident reports.[37] "The criminal investigation and incident reports are not exempt from disclosure under the Missouri Sunshine Law or protected as educational records by FERPA," Clark said. "If FERPA is interpreted otherwise, to impose a penalty for disclosure of the criminal investigation and incident reports, it is unconstitutional."[38]

Clark's opinion provided a boost for student journalists, media advocates and the Student Press Law Center (SPLC). The opinion was "stronger than any of us imagined," said Mark

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[36] Bauer at 581.

[37] Id. at 595.

[38] Id.

Goodman, director of the SPLC in Washington, D.C. "It was a pleasant surprise."[39] Goodman said the center was pleased that the ruling tied the university violation to First Amendment rights as well as state law. The court could have handled the suit as just a violation of state open records laws. In his ruling, Clark advocated a liberal interpretation of state sunshine laws, referring several times to the legislature's intent to open records to the public. Clark resolved the apparent conflict between the federal Buckley Amendment and the state's sunshine laws by looking at the reasons behind the legislation and how public policy could best be served.

Missouri's Open Records Act or the "Sunshine Law" provides that all public records of public governmental bodies shall be open to the public for inspection except as otherwise provided by law.[40] "It is the fundamental policy of the Missouri Sunshine Law to foster openness in government," Clark said. "The Sunshine Law is to be liberally construed and its exceptions strictly construed so as to promote this public policy."[41]

The Missouri Board of Regents contended that SMSU was not a public governmental body as defined by state law and that incident reports were not public records. Clark rejected that argument, noting that Missouri case law stressed that any record of any public governmental body, administrative or legislative, is a public record within the meaning of the Sunshine Law.[42] The judge criticized university officials for setting up a system that "insulated" the Board of Regents.[43] The university maintained that the records were never retained by a

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[39] Telephone interview with Mark Goodman, director of the Student Press Law Center in Washington, D.C. (July 10, 1991).

[40] REV. STAT. MO. §610.011.2 (1990)

[41] Bauer at 581.

[42] Id. at 582.

[43] Id. at 583.

public body, as state law requires, because the records were not provided to the Board of Regents. Clark, however, noted the school's Safety and Security Department was headed by a director who reported to the university president, who reported to the Board of Regents. Creating an intermediate reporting level to shield sensitive information from disclosure under state sunshine laws thwarted the purposes of the law, Clark wrote.[44]

Clark not only suggested that the university was avoiding the Sunshine Law, but that officials were reading too much into the law's exceptions. References to campus criminal investigation and incident reports or records of a campus law enforcement unit are "noticeably absent" from the list of exceptions under state law, Clark said.[45] The list of exceptions includes education records such as test scores, test materials and scholastic probation and expulsion records.[46] That list suggests that the legislature did not intend to exempt records maintained by university police departments for law enforcement purposes, Clark said.

The judge next considered how FERPA controls release of campus crime records. Bauer claimed that FERPA does not cover law enforcement records because they are not education records. University officials and the Department of Education argued that criminal investigation reports were specifically excluded only if three conditions were met.[47] The police records must be kept apart from education records, maintained solely for law enforcement purposes and made available to no one other than law enforcement officials in the same jurisdiction. At SMSU crime records were separate from education records and they were maintained solely for law enforcement purposes. However, the third condition created problems.

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[44] Id.

[45] Id. at 585.

[46] Id. at 585 n1.

[47] Id. at 589.

Judge Clark concluded that Congress intended the law to protect student educational records, not police records. "Nothing in the legislative history of FERPA refers to a policy or intent to protect campus law enforcement records which contain students names or other personally identifiable information," he said.[48] Just because a person enrolls at a state university should not entitle him to any greater privacy rights than members of the general public, as far as crime reports are concerned, the judge explained.

FERPA AND THE CONSTITUTION

Bauer alleged university officials violated her Fifth Amendment right to equal protection[49] by treating students differently than the general public. If FERPA is interpreted to impose a penalty on schools that disclose such crime reports, it is unconstitutional because it creates arbitrary classifications of student and non-student criminals and victims that results in unequal police protection, she argued.[50] To test her claim, Judge Clark looked to the legislature's objective in enacting the statute and whether the classification was rationally related to a legitimate governmental interest. He concluded that the classification is not rationally related because students are treated differently than the general public, violating the Constitution.[51]

"The Court finds nothing in the language of the statute or its legislative history which indicates that student criminals, witnesses or victims should be granted special privacy

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[48] Bauer at 591.

[49] The Fifth Amendment guarantees due process of law to U.S. citizens.

[50] Bauer at 591.

[51] Clark's discussion of the Constitution and FERPA could be considered dicta - language not necessary to the case ruling, because the case was decided on statutory grounds. Clark used state law and federal law to decide the ruling. Dicta is language in a judge's opinion that does not embody the precise holding of the court and that goes beyond that facts of the case. It is not binding in subsequent cases. Black's Law Dictionary, Abridged Fifth Edition.

privileges," Clark said.[52] "By the same token, a student should not be denied access to information concerning student criminals, victims or witnesses merely because of his or her status as a student."

In the last section of his opinion, Clark discussed Bauer's First Amendment rights. In his analysis, Clark faced the familiar question of whether Richmond Newspapers v. Virginia,[53] recognized a First Amendment right of access to newsworthy government information. Clark concluded that student journalists and the public do have a right of access to campus police reports. He noted, however, that the Supreme Court has held that journalists have no greater rights than the public.

The Supreme Court has referred to the First Amendment right to receive information and ideas, Clark said. "It is also surely one of the purposes of the First Amendment to enable the public to scrutinize the actions of government through access to government information."[54] State courts have generally held that at least some crime reports are constitutionally required to be available to the public, despite competing interests such as a suspect's right to privacy.[55]

By finding Constitutional grounds for allowing Bauer access to police reports, Clark went beyond enforcing state open records laws. He also moved into dicta, because he already had decided that state sunshine laws required access and FERPA did not apply. Clark extended the right of access to government information that the Supreme Court recognized in Richmond Newspapers to police records. This finding may be a questionable extension of Richmond,

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[52] Bauer at 593.

[53] 448 U.S. 555 (1980).

[54] Bauer at 594.

[55] Id. citing Houston Chronicle Publishing Co. v. Houston, 531 SW 2d at 177, 186 (Tex. Civ. App. 1975).

because Richmond involved access to courts based on a tradition of openness and Bauer involved access to police records.

THE AFTERMATH OF BAUER

Southwest Missouri State University opened campus police reports to the student newspaper soon after the Bauer case was decided in 1991.[56] The Board of Regents chose not to appeal after spending some $40,000 defending the case.[57] The Department of Education, however, attempted to intervene and join the suit. Judge Clark found the department had acted too late to intervene.[58]

Although Bauer apparently settled the law at SMSU, many universities still did not release their police reports. They were worried about losing their federal funding if the Department of Education followed through on its threat to enforce a penalty against schools who made campus crime reports available to the press. Fourteen universities received warning letters from the department in February 1991, while Bauer was in court.[59] The letter explained that the records of a campus law enforcement unit become education records once they are disclosed to the press.[60]

The department learned about the 14 schools that released police reports because of a survey introduced into evidence in the Bauer case, said LeRoy S. Rooker, director of the DOE's family policy compliance office. When his office learned of the "misunderstanding" on the part

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[56] Telephone interview with Goodman (July 18, 1991).

[57] Jerry Nachtigal, "Open records suit engulfs student's life," Gainesville Sun, May 8, 1991. §A at 1.

[58] "State Sunshine Law Applies to Reports, Declares Missouri Federal Court Judge," Student Press Law Center Report, Spring 1991, at 8.

[59] The threatened schools were: Arizona State, Colorado State, Georgia, Idaho, Illinois State, Iowa State, Kentucky, Louisiana State, James Madison, Maryland at College Park, Memphis State, the University of North Carolina at Chapel Hill, Oakland and Western Kentucky.

[60] Letter from LeRoy S. Rooker, director of family policy compliance office, DOE, to universities (Feb. 22, 1991).

of those schools, it mailed letters to the universities explaining that police record information is confidential. The letters were only an effort to offer "technical assistance" to the schools, Rooker said.[61]

The DOE has continued to maintain that the Buckley Amendment makes most campus police records confidential, despite Judge Clark's ruling. "The law still says what it does," Rooker said. "We have an responsibility to enforce it (the law) unless it is changed."[62] Many university officials still feel trapped between the federal privacy act and conflicting state open-records laws. Most states have open records laws similar to Missouri that require police agencies to release their incident reports. But with large sums of federal money at stake, universities do not want to take any chances. Many police departments did not disclose names on incident reports during the fall of 1991, Goodman said.

Other courts, however, have followed the precedent of Bauer. Arkansas Circuit Court Judge Harry F. Barnes ruled in Rosa Jones v. Southern Arkansas University that campus police reports are not education records protected by FERPA.[63] Rosa Jones and Shea Wilson, student editors of The Bray, sued the university in March 1990 for refusing to release university crime reports. They argued the university violated the Arkansas Freedom of Information Act when it failed to release records. The university cited FERPA and said it would jeopardize its federal funding if it released the records.[64]

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[61] Telephone interview with Rooker (July 11, 1991).

[62] Id.

[63] Jones v. Southern Arkansas University, No. CIV-90-88. (May 1991).

[64] "Arkansas Circuit Court Adopts Findings in Missouri Case and 'Rules in Like Fashion,'" Student Press Law Center Report, spring 1991. p. 8.

In an April 16 letter to the parties, Judge Barnes stated that the facts in Jones were very similar to those in the Missouri case of Bauer. Judge Barnes substantially adopted the Bauer findings. He held that student journalists are entitled to "full and complete information as it is contained in the incident reports."[65]

In Florida, the University of Florida continued to release police records under a 1986 state court order that UF attorneys said protects the university from any DOE action.[66] In Campus Communications v. Criser, the Eighth Judicial Circuit Court ruled campus police records were not educational records and should be open.[67] The ruling was based on the state's Public Records Law and FERPA was not an issue. In its defense, the university relied on a state educational privacy law.

Judge Carlisle said education records such as test scores and aptitude tests are properly classified as confidential.[68] However, a student's enrollment at a state university does not entitle him to any greater privacy rights than members of the general public when it comes to reporting criminal activity. "The Florida Legislature never intended to make university students a specially protected class of crime victims," Judge Carlisle wrote.[69]

A Congressional solution would be one way to end the confusion for universities and journalists. Two amendments to FERPA were proposed in 1991 but neither made it through the legislative process. Both would have allowed universities to release campus crime reports. Lamar

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[65] Letter from Harry F. Barnes, Arkansas Circuit Judge, 13th Judicial Circuit. (April 16, 1991)

[66] Jack Wheat, "Court order allows police at UF to release names," The Gainesville Sun, May 8, 1991.

[67] Campus Communications v. Criser, 13 Med. L. Rptr. 1398 (Fla. 1986).

[68] Criser at 1399.

[69] Id.

Alexander, the secretary of the Department of Education,[70] proposed excluding campus crime reports from the education records category of FERPA.

Until Congress passes an amendment making the change, the department must enforce the law as it is now written, Rooker says. Law enforcement records have always been excluded from FERPA as long as they were maintained in a certain fashion, he explained. The law requires the police records be kept apart from education records, maintained solely for law enforcement purposes and not made available to persons other than law enforcement officials of the same jurisdiction, he said. The proposed Legislative changes would merely remove these three requirements, making it clear that all law enforcement records kept separately from education records are excluded and open to public review, Rooker explained.[71]

In a classic "catch-22," SMSU and other institutions have argued that they have been forced to withhold student names on police reports from reporters.[72] If police records are education records, the institutions claim FERPA prohibits release of student information. Even if the records are not considered education records, law enforcement officials claim the inforamtion cannot be released to anyone other than law enforcement officials in the same jurisdiction.

The DOE has never actually withdrawn any federal money from an institution. It always obtains voluntary compliance with FERPA because of its leverage with federal money.[73]

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[70] Press release from Department of Education (July 11, 1991).

[71] Rooker, (July 18, 1991).

[72] Ogg, supra, at 51.

[73] Student Press Law Center v. Alexander, 778 F. Supp. 1227, (D.D.C. Nov. 21, 1991).

A NEW DECISION

In an attempt to resolve the confusion about FERPA, the Student Law Press Center sued the Department of Education.[74] In November 1991, Federal Court Judge Stanley Harris granted a preliminary injunction stopping the DOE from taking any action to withhold funds.[75] He ordered the DOE not to withdraw or threaten to withdraw federal funding of a university because the institution provides public access to law enforcement records. He also ordered the DOE not to issue technical assistance letters asserting the authority to withdraw federal funding.

The court ruled that the Student Press Law Center had a substantial likelihood of success on the merits of its claim that the DOE's use of the federal law violated the First Amendment.[76] "The right to receive information and ideas is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution," Judge Harris said.[77] "Defendants (DOE) have not offered a single justification for preventing universities from disclosing the names of students involved in criminal activity. The Government must assert some interest that outweighs the public's First Amendment right to receive information." In one sentence, Harris dismissed the Fifth Amendment concern, saying the journalists did not show how it applied.[78]

The press center was joined in its suit by three student journalists: Lyn Schrotberger, editor of the Rocky Mountain Collegian at Colorado State University student newspaper in Ft. Collins, Colo.; Sam Christy, editor of the Daily Beacon at University of Tennessee and Clint

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[74] Press release from the Student Press Law Center. (Nov. 21, 1991)

[75] Student Press Law Center at 1234.

[76] Id. at 1234.

[77] Id.

[78] Id. at 1233.

Brewer, former editor and president of the campus Society of Professional Journalists chapter at Tennessee.

The DOE filed a motion to dismiss the action in January 1992, with a 40-page brief explaining why its interpretation of FERPA does not involve the any "legitimate First Amendment interest."[79] The DOE argued that the governmental interest involved in restricting FERPA's release of campus crime reports outweighs the public's First Amendment right to receive information. FERPA does not make public release of information involving students either illegal or impossible to accomplish in practice, the brief said. All a university has to do is segregate its law enforcement unit from all other university functions and "hand-carry or telefax" its arrest and incident reports to another law enforcement entity, such as a local or state police department.[80] Even though this procedure might seem cumbersome, the DOE's attorneys argue that Congress could have rationally thought it would be better for campus crime reports to be screened by an outside law enforcement agency before release to the public.

"It seems prudent enough to require the campus unit to defer to the judgment of off-campus authorities in determining what basic crime-report information can safely be released to the public in the immediate aftermath of a crime or arrest," the brief stated. "Local police are more likely to be experienced in such delicate matters [than campus police]."[81]

Several college newspapers have said their schools continue to deny access to campus police records because of fear the DOE will withdraw their federal funds, according to Mark

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[79] Defendants' Memorandum in Support of Their Motion to Dismiss, p. 5, filed Jan. 17, 1992. As of June 22, 1992, Judge Harris had not ruled on the motion to dismiss.

[80] Id. at 10.

[81] Id. at 15, 16.

Goodman of the SPLC.[82] These newspapers include student publications at Jacksonville State University in Alabama, Sam Houston State University in Texas, the University of Dayton in Ohio, and Temple University in Pennsylvania. Some schools are avoiding compliance by mixing police records with student education records, Goodman said.[83] The Department of Education allegedly has told some schools that if police have access to education records, then police records are protected by FERPA.[84] The DOE has declined to comment on its position since January 1992. Goodman said the Student Press Law Center may have to return to federal court in the late summer for a clarifying order to assure journalists of access to police reports.

CONCLUSION

Resolving the conflict between open records laws and federal privacy law on campus police reports should be easy. Almost everyone involved - including the Department of Education - now agrees in theory that journalists and the public should have access to campus police records, regardless of FERPA. The problem is opening campus police records officially and nationally.

The Bauer decision opening SMSU police records in Missouri already has influenced courts. Judge Harris cited Bauer as support for his ruling in Student Press Law Center. The federal court decision in Washington, D.C. has national implications because it controls the DOE. The opinion is strongly worded and considers the merits of the case, so no permanent injunction may be required. Thus, even if Judge Clark's discussion of the constitutional issues of FERPA was dicta, it is dicta accepted by other courts.

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[82] Student Press Law Center Press Release, Jan. 27, 1992.

[83] Telephone interview with Goodman (June 22, 1992)

[84] Supra, at 10.

However, the DOE's detailed brief accompanying its motion to dismiss shows it has not yet given up the fight. The DOE uses Congressional documents to argue that Congress could have intended to release information only through local off-campus police departments. This interpretation seems unlikely and farfetched based on FERPA's history. According to Goodman, DOE is still helping schools to avoid release of police reports. Given Buckley's concern about parental rights, he might be swayed by the current worries of students and parents about campus crime. Several parent groups support laws that would open campus police records to the public so that parents and students could better judge the safety of their schools.

The legislative history shows the unusual route Congress took in approving the Buckley Amendment. First, the amendment required both access and privacy - two elements not usually handled well together in one brief bill. Second, the hearings on the amendment came three years after the law was passed instead of when it was under consideration in Congress. Senators reacted after the fact to concerns of education officials. Finally, the law enforcement provisions were added with virtually no recorded discussion. This exception to FERPA - the most ambiguous and troublesome part of the law - has virtually no legislative history. The language is awkward and confusing, making it easy for different groups to interpret it differently.

Congress adopted the Buckley Amendment when legislators were preoccupied with Watergate. Congress apparently saw FERPA as an access law requiring schools to be more accountable to students and their parents. When the law is viewed in that light, keeping police records secret seems to work against the interest of most students and their parents.